ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
General Dynamics C4 Systems, Inc.	)	ASBCA No. 54988
	)	
Under Contract No. N00039-98-D-0029	)	

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OPINION BY ADMINISTRATIVE JUDGE SCOTT
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Appellant appealed from the contracting officer's final decision denying its claim under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, for an equitable adjustment for costs pertaining to its performance of certain delivery orders under its indefinite delivery, indefinite quantity (IDIQ) contract to supply digital modular radios (DMRs) to the Navy's Space and Naval Warfare Systems Command (SPAWAR). Substantial discovery has occurred (app. resp. at 2). Appellant has moved for summary judgment on entitlement. It supports its motion with the sworn declaration of Stephen A. Polowski, its Contract Manager Staff (app. mot., ex. A, 1/13/06 Polowski decl., ¶ 1). The Navy supports its opposition with the sworn declaration of contracting officer Mark Lopez (gov't resp., ex. A). The Navy has also cross-moved for summary judgment. It supports its motion with Mr. Lopez's declaration and with the sworn declaration of administrative contracting officer Mark E. Shumake (gov't mot., ex. E). Appellant supports its opposition with a second sworn declaration by Mr. Polowski (app. resp., ex. C, 9/5/06 Polowski decl.) and with the sworn declarations of its Director of Engineering, Byron Tarver (*id.*, ex. A, Tarver decl., ¶ 1) and its Contract Manager – Senior Staff, Michael S. Schumacher (*id.*, ex. D, Schumacher decl., ¶ 1). Both parties also support their motions and oppositions with the pleadings, Rule 4 file documents, and exhibits, including discovery responses.

FACTS FOR PURPOSES OF THE MOTIONS

Based upon the parties' submissions and the record, the following facts are undisputed or have not been controverted. We also include contract provisions and regulations.

On 4 September 1998, SPAWAR awarded the subject IDIQ contract for DMRs and associated items to Motorola, Inc., Systems Solutions Group (R4, tab 5 at 1). By novation agreement entered into as of 28 September 2001, General Dynamics Decision Systems, Inc. (GDDS) assumed the contract from Motorola. The government recognized the novation by modification effective 1 February 2002, applicable to the subject contract and others. Effective 1 January 2005 GDDS changed its name to General Dynamics C4 Systems, Inc. (GDC4S). (Compl., answer ¶ 3; app. mot. at 3, ¶ 4; gov't resp. at 2, ¶ 4, ex. C; *see also* R4, tab 2 at 1-2)

A DMR is a "software-defined" radio in which the functionality of various radios is duplicated through software. A single DMR can interoperate with many radios already in use, and the capability to interoperate with other radios can be added to the DMR through further software development. A "waveform" is a complete software description necessary to permit the DMR to function as a particular type of radio. The contract was for acquisition of production quantities of the DMR and provided that the government could exercise various options for ordering periods and for additional radio capabilities, such as additional waveforms. (Compl., answer ¶¶ 9-11)

The DMR solicitation had been advertised under the classification code for "Communication, Detection, and Coherent Radiation" equipment and not under the code for "general-purpose information technology" (app. resp., ex. B at Commerce Business Daily notice posted 2/26/1998; gov't reply at 17). A 15 March 1999 SPAWAR primer describing the DMR refers to it as a "radio" and not as "information technology" (app. resp., ex. A, Tarver decl., ¶ 3, and attach.; gov't reply at 17).

The contract at award included initial contract line item number (CLIN) 0001 for three to six each "Surface Ship UHF SATCOM/LOS/SINCGARS four channel Transmit/Receive Radio," at the unit price of $648,000, and options (R4, tab 5 at B-1). Contract clause H-5, EXERCISE OF OPTIONS, provided in part:

> (a) The Government may exercise options in whole or in part anytime during the option periods set forth herein to require the Contractor to produce and deliver hardware items or provide services specified in the contract. . . . These options shall be exercised if at all by written notice signed by the Contracting

> Officer, transmitted to the contractor at anytime during the option exercise period set forth below: . . . .

(*Id*. at H-2) The clause then listed six groups of CLINs and associated option exercise periods. The contract referred to the first group of CLINs, which covered warranties and data requirements, as an "OPTION" and to the next five groups as Options I through V. The CLIN unit prices for the DMRs, as of contract award, decreased considerably with each option. Option V, which covered CLINs 0501-0538 and 1001-10021, with a specified option exercise period of 1 October 2002 through 30 September 2003, is at issue. (*Id*. at B-1, -8, -18, -28, -38, -47, -50)

At the time of contract award, FAR 4.502, Policy, provided:

> (a) The Federal Government shall use FACNET [Federal Acquisition Computer Network] whenever practicable or cost-effective. Contracting officers may supplement FACNET transactions by using other media to meet the requirements of any contract action governed by the FAR (e.g., transmit hard copy of drawings).
>
> (b) Before using FACNET, or any other method of electronic data interchange, The [sic] agency head shall ensure that the electronic data interchange system is capable of ensuring authentication and confidentiality commensurate with the risk and magnitude of the harm from loss, misuse, or unauthorized access to or modification of the information.[1]

As of contract award, FAR 4.503, Contractor registration, stated in part:

> (a) In order for a contractor to conduct electronic commerce with the Federal Government, the contractor must provide registration information to the Central Contractor Registration (CCR). . . .

The contract incorporated by reference Department of Defense FAR Supplement 252.204-7004, REQUIRED CENTRAL CONTRACTOR REGISTRATION (MAR 1998) (R4, tab 5 at I-4). The clause stated, *inter alia*, that the "CCR database means the primary DoD repository for contractor information required for the conduct of business with DoD" (¶ (a)(1)) and that "[b]y submission of an offer, the offeror acknowledges the requirement

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[1] Effective 30 October 1998, FAR 4.502 was amended to refer to "electronic commerce," among other changes.

that a prospective awardee must be registered in the CCR database" (¶ (b)(1)). Appellant and its predecessors were registered in the CCR (*see* gov't mot. at 10, ¶ 19, ex. E Shumake decl., attach. A; app. resp. at 28).

As of contract award, FAR Subpart 16.5--INDEFINITE-DELIVERY CONTRACTS, § 16.505(a)(5), Ordering, stated: "Orders may be placed by facsimile or by electronic commerce methods, *if provided for in the contract*" (emphasis added).

At "SECTION I - CONTRACT CLAUSES," the contract included the following version of the FAR 52.216-18, ORDERING (OCT 1995) clause:

> (a) Any supplies and services to be furnished under this contract shall be ordered by issuance of delivery orders or task orders by the individuals or activities designated in the Schedule. Such orders may be issued from [CLINs 0001-0127, from contract award through 365 days thereafter; 0201-0238, from option exercise date through 365 days thereafter; 0301-0338, from option exercise date through 365 days thereafter; 0401-0438, from option exercise date through 365 days thereafter; 0501-0539, from option exercise date through 365 days thereafter].[2]
>
> However, no order for CLINs 0501-0539 shall be placed after 30 September 2003.
>
> (b) All delivery orders or task orders are subject to the terms and conditions of this contract. In the event of conflict between a delivery order or task order and this contract, the contract shall control.
>
> (c) If mailed, a delivery order or task order is considered "issued" when the Government deposits the order in the mail. *Orders may be issued orally, by facsimile, or by electronic commerce methods only if authorized in the Schedule*. [Emphasis added]

(R4, tab 5 at I-5) Each delivery order (DO) issued under the contract included "SECTION I - CONTRACT CLAUSES," which stated: "As specified in the basic contract" (*e.g.*, R4, tab 9, DO No. 18 at 3 of 3).

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[2] The contract's Schedule B and the Exercise of Options clause of record apparently do not list a CLIN 0539, but this is immaterial (R4, tab 5 at B-47, H-2, H-3).

The parties agree that the contract Schedule did not designate any support services contractor as permitted to place delivery orders and did not authorize the issuance of delivery orders orally, by facsimile, or by electronic commerce methods such as e-mail (R4, tab 2 at 2, tab 5; app. mot. at 3-4, ¶¶ 7, 8; gov't resp. at 3, ¶¶ 7, 8; compl., answer ¶ 16).

Bilateral modifications, *inter alia*, modified the contract's Ordering clause to revise the dates that certain delivery orders, not part of appellant's claim, could be issued. Each modification stated that "[e]xcept as provided herein, all terms and conditions of the [contract], as heretofore changed, remains [sic] unchanged and in full force and effect." (R4, tab 6, P00007 at 1, 5, P00018 at 1, 7, tab 7, P00021; app. mot. at 4, ¶¶ 9-11; gov't resp. at 3, ¶¶ 9-11) The parties agree that the Ordering clause's provisions concerning who had authority to order; the manner in which binding orders were to be issued; and the final date for placing orders under Option V CLINs were not modified (app. mot. at 4, ¶ 12; gov't resp. at 3, ¶ 12; *see also* R4, tabs 6-8).

The contract incorporated by reference the FAR 52.216-22, INDEFINITE QUANTITY (OCT 1995) clause (R4, tab 5 at I-1), which provides in part:

> (a) This is an indefinite-quantity contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract.
>
> (b) Delivery or performance shall be made only as authorized *by orders issued in accordance with the Ordering clause.* [Emphasis added]

The contract incorporated by reference the FAR 52.233-1, DISPUTES (OCT 95) clause (*id*. at I-2), which provides in part

> (i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

The contract also incorporated by reference FAR 52.243-1, CHANGES--FIXED-PRICE (AUG 87) and FAR 52.243-3, CHANGES--TIME-AND-MATERIALS OR LABOR-HOURS

(AUG 87) clauses, with the latter to apply to Time-and-Materials CLINs only (R4, tab 5 at I-2). The Fixed-Price Changes clause provides in part:

> (a) The Contracting Officer may at any time, by written order, . . . make changes within the general scope of this contract in any one or more of the following:
>
> (1) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.
>
> (2) Method of shipment or packing.
>
> (3) Place of delivery.
>
> (b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.
>
> . . . .
>
> (e) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

The Time-and-Materials or Labor-Hours Changes clause is similar, except it refers to changes in drawings, designs or specifications; shipment or packing methods; place of delivery; and amount of government-furnished property (¶ (a)), and it states in part:

> (b) If any change causes an increase or decrease in any hourly rate, the ceiling price, or the time required for performance of any part of the work under this contract, whether or not changed by the order, or otherwise affects any other terms and conditions of this contract, the Contracting Officer shall make an equitable adjustment in the (1) ceiling price, (2) hourly rates, (3) delivery schedule, and (4) other affected terms, and shall modify the contract accordingly.

The clause also provides that failure to agree to an adjustment is a dispute under the Disputes clause but that nothing in the Changes clause excuses the contractor from proceeding with the contract as changed (¶ (d)).

SPAWAR exercised Option IV, covering CLINs 0401 through 0439 and 1901, through bilateral Modification No. P00026, effective 27 September 2002, which also addressed other matters (R4, tab 7, P00026 at 2 of 4). On 8 July 2003 it issued DO No. 16 for, among other things, 12 high frequency (HF) items under CLIN 0416 (R4, tab 9). By letter dated 23 July 2003 to contracting officer Lopez, appellant requested that SPAWAR delete the CLIN 0416 portion of the delivery order on the ground that "SPAWAR has waived, both expressly and by its actions, any right to order HF under the HF CLINs in the DMR Contract" (app. mot., ex. A, Polowski decl., attach. B at 1). The contracting officer responded by letter of 28 July 2003 that SPAWAR's alleged representations and actions related to negotiations for a contract modification, but the parties failed to achieve a mutually acceptable one and, "[t]herefore, the contract, as written, remains in full force and effect" (*id*., attach. C).

SPAWAR exercised Option V, said to cover CLINs 0501 through 0539 and CLIN 1001, by unilateral Modification No. P00034, effective 10 September 2003, 20 days before the Option V ordering period expired (R4, tab 7; app. mot. at 5, ¶¶ 13, 14; gov't resp. at 3-4, ¶¶ 3, 14; compl., answer ¶ 19).

On 19 September 2003, about a week before the Option IV ordering period expired, SPAWAR issued DO No. 17, for repair parts, under that option, as an electronic attachment to an e-mail from a Navy support contractor (R4, tab 9, DO No. 0017 at 1-2 of 2; app. mot. ex. A, Polowski decl., ¶ 3, attach. A; *see also* Ordering Clause).

Thereafter, SPAWAR's support contractor transmitted Option V DO Nos. 18-20 and 22-29, to GDDS as electronic attachments to e-mails sent between Friday, 26 September 2003, and Tuesday, 30 September 2003. The contractor received the e-mails between 27 and 30 September 2003. At the time, there was no indication of DO No. 21's status; the contracting officer stated in his final decision, and the parties agree, that SPAWAR did not issue it. (R4, tab 2 at 2, ¶ 9, tab 9; app. mot. at 6-7, ¶¶ 17, 19; gov't resp. at 4-6, ¶¶ 17, 19, ex. B, app's responses to interrogatories Nos. 4, 5; compl., answer ¶ 20; *see also* app. mot., ex. A, Polowski decl., ¶¶ 3, 7, and attach. A)

As issued, DO Nos. 18, 19, 20, 23 and 28 were for radios or radio items at fixed unit prices; No. 22 was for test plans, reports, training and instructional materials, etc., at fixed unit prices; No. 24 was for 339 hours of field engineering support at an hourly rate and for material support at a fixed unit price; No. 25 was for spare parts at fixed prices; No. 26 was for 99 hours of field engineering support at an hourly rate; No. 27 was for

radios or radio items and repair parts at fixed unit prices; and No. 29 was for a report at a fixed price (R4, tab 9).

The parties' records reflect the common reported facts that on 2 October 2003, after the Option V ordering period had ended, Mr. Polowski, then GDDS' senior contract manager, spoke by telephone with contracting officer Lopez. Mr. Polowski asked if the Navy would be issuing hard copies of the delivery orders by mail, stating that GDDS' financial office was requesting hard copies. Mr. Lopez responded that the Navy's policy was to be "paperless" and it was making electronic distribution. (R4, tab 4, attach. 3; gov't resp., ex. A, Lopez decl., ¶ 8, and tab A; *see also* answer ¶ 23)

There were 28 delivery orders under the contract, Nos. 1 through 20, and 22 through 29 (R4, tab 9). The contracting officer, then David Bodner, issued the first delivery order, dated 8 September 1998, by United States mail (R4, tab 9; compl., answer ¶ 17). He also issued DO Nos. 2 and 3 (R4, tab 9). There is no direct evidence of record concerning the method or methods of issuing those two orders. However, the Navy asserts that all delivery orders after the first one were issued via electronic mail (gov't resp. at 7, ¶ 22), and appellant has not contested this. In fact, appellant alleges that the contractor "decided to accept e-mailed Delivery Orders 2 through 15, which were counteroffers by SPAWAR, because those counteroffers were consistent with the agreements reached previously by the parties and offered business the company was willing to take" (app. resp. at 7, ¶ 6).

The successor contracting officer, Mr. Lopez, declares without contradiction that he issued 25 DOs by signing the original order, which was printed on a piece of paper, with an ink pen. The Navy's support contractor then scanned the order into an electronic image and distributed copies electronically, including to GDDS. (Gov't resp., ex. A, Lopez decl., ¶¶ 6-7) Mr. Lopez declares that this was and remains the "normal process" for issuing delivery orders at SPAWAR headquarters (*id*. ¶ 8).

By letter to contracting officer Lopez dated 6 October 2003, referring to DO Nos. 17-20 and 22-29, Mr. Polowski stated:

> The Schedule in the Contract does not permit orders by electronic commerce methods such as e-mail. Additionally, the Ordering clause states ". . . . [N]o order for CLINS 0501-0539 shall be placed after 30 September 2003." Therefore, the Government can no longer lawfully place a binding order with General Dynamics under the Contract.
>
> General Dynamics, as you no doubt appreciate, is not in a position to voluntarily accept orders under the DMR contract

> at option year 5 prices. Therefore, we reject your orders under the Contract.
>
> The orders you submitted are rated orders under the Defense Priorities and Allocation System. General Dynamics is willing to submit cost and technical proposals to meet your requirement, or, alternatively, to proceed under a letter contract, or, alternatively to proceed under the Changes clause. We await your direction.

(R4, tab 4, attach. 4)

The contracting officer responded by letter of 8 October 2003 that the Navy considered the orders to be validly issued in accordance with the Navy's and GDDS' previous course of performance under the contract. Although the Navy now acknowledges that the first DO was issued by mail, the contracting officer asserted in his letter that DO Nos. 1 through 16 had all been issued by electronic distribution, and that GDDS had always accepted that method. He stated that the Navy considered DO Nos. 17-20 and 22-29 to be validly issued and, in light of GDDS' statement that it was rejecting the orders, he requested reasonable assurances by 15 October 2003 that the contractor would perform the orders in accordance with the contract's terms and conditions. (R4, tab 4, attach. 5)

GDDS responded by letter to the contracting officer dated 10 October 2003 that while it did not agree with the Navy's position, it viewed the contracting officer's assertion that the subject orders were valid under the contract and his request for reasonable assurances as a directed change to proceed under the Changes clause. GDDS stated that it would proceed with the work and submit a request for equitable adjustment. (R4, tab 4, attach. 6)

GDDS delivered radios under the disputed DOs and SPAWAR conditionally accepted them, albeit asserting that they are nonconforming (app. mot. at 9, ¶ 28; gov't resp. at 8, ¶ 28).

Option V DO Nos. 18-20 and 22-29 are at issue. GDDS did not receive them through the U.S. mail or by hand-delivery prior to the expiration of the Option V ordering period or at any time (app. mot. at 8, ¶¶ 22, 23; gov't resp. at 7, ¶¶ 22, 23; app. mot., ex. A, Polowski decl., ¶ 6). They were transmitted to GDDS as electronic portable document format (PDF) attachments to e-mails from the Navy's support contractor. The attachments contain electronic images of the delivery orders, including the contracting officer's signature. They do not contain his digital signature. (App. mot. at 7, gov't resp. at 5, ¶ 18; app. mot., ex. A, Polowski decl., ¶¶ 3, 4, and attach. A; *see, e.g.*, R4, tab 9 at

DO 0018) The PDF "Document Properties" state that they do not employ a "Security Method" that "restricts what can be done to the document," and that content copying or extraction and filling in of form fields is allowed (app. mot., ex. A, attach. A). Appellant alleges that it "faced uncertainty as to authenticity and alteration of" the delivery orders (app. mot. at 17), but it has not offered any sworn declaration or other evidence of any alteration or of such uncertainty.

The contracting officer never sought the contractor's agreement to modify the contract to authorize the contracting officer to issue oral, facsimile or electronic delivery orders (app. mot. at 8, ¶ 24; gov't resp. at 7, ¶ 24).

On 4 February 2004 GDDS submitted a certified CDA claim to the contracting officer covering two matters: (1) DO Nos. 18-29, said not to have been validly exercised during the contract's ordering period because they were sent by e-mail (GDDS did not include DO No. 17 in its claim); and (2) the government's alleged invalid attempt to order the HF waveform under DO No. 16 after waiving its right to do so (R4, tab 4, transmittal ltr. at 1; app. mot. at 9, ¶ 29; gov't resp. at 8, ¶ 29). GDDS sought $78,220,345 under the invalid delivery orders claim and $11,733,695 under the HF claim, for a total of $89,954,040 (R4, tab 2 at 1, tab 4, transmittal ltr. at 1; compl. ¶ 34).

GDDS' $78,220,345 invalid delivery orders claim included a $51,412,757 price adjustment, with profit, plus $26,807,588 for software licenses (R4, tab 3 at 1, tab 4, § 1.0 at 4, 5A). GDDS stated: "This dispute is based on several unilateral orders the Government placed under the Contract in 2003 that we assert were invalid and which were at prices that, in light of the facts existing in 2003, were unconscionable" (R4, tab 4, transmittal ltr. at 1). GDDS claimed that when the Navy exercised Option V, it knew the contractor "was incurring undue risks based on the technical requirements, lack of Navy orders, and the costs of production," and that the option exercise under those circumstances violated FAR 17.202(c)(1) (*id*. at 3). GDDS also claimed that, at the time of the e-mailed Option V orders at the end of September 2003, more than five years had passed since the initial contract award and delivery order, and the Navy was acquiring supplies required in the sixth year following award, in violation of FAR 17.204(e), with respect to which the contracting officer had not sought or received a waiver (*id*. at 2). GDDS claimed that the Navy's rejection of its notice of the alleged ineffective issuance of the delivery orders and its insistence upon performance by demanding reasonable assurances was a constructive change, entitling the contractor to an equitable adjustment (*id*.). The claim described the DMR as "essentially a very complex computer" (*id*. at 1).

FAR 17.202, Use of options, provides in part:

> (a) Subject to the limitations of paragraphs (b) and (c) of this section, for both sealed bidding and contracting by

> negotiation, the contracting officer may include options in contracts when it is in the Government's interest. . . .
>
> . . . .
>
> (c) The contracting officer shall not employ options if --
>
> (1) The contractor will incur undue risks; e.g., the price or availability of necessary materials or labor is not reasonably foreseeable; . . . .

FAR 17.204(e) provides:

> (e) Unless otherwise approved in accordance with agency procedures, the total of the basic and option periods shall not exceed 5 years in the case of services, and the total of the basic and option quantities shall not exceed the requirement for 5 years in the case of supplies. *These limitations do not apply to information technology contracts*. [Emphasis added]

As in effect at contract award, FAR 2.101, Definitions, defined FACNET and "Information technology." It provided in part that:

> "Information technology" means any equipment, or interconnected system(s) or subsystem(s) of equipment, that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the agency

A 15 September 2004 Defense Contract Audit Agency (DCAA) audit report questioned $4,098,232 of appellant's $78,220,345 claimed costs (R4, tab 3 at 1, 3).

By final decision of 26 January 2005, the contracting officer denied appellant's claims (R4, tab 2 at 1; app. mot. at 9, ¶ 31; gov't resp. at 9, ¶ 31). It timely appealed from the denial of the invalid delivery orders claim on 14 April 2005. It did not appeal from the denial of the HF DO No. 16 claim.[3] (Bd. corr. file; app. mot. at 22 n.5)

[3] The Navy states that the HF claim was resolved by bilateral modification in December 2004 (gov't mot. at 7 n.3).

In its complaint appellant stated that "[t]he amount in dispute is $78,220,345, plus interest pursuant to the [CDA], less payments made by SPAWAR since GDC4S submitted its claim" (compl. ¶ 34). It elaborated that:

> 36. The Orders are invalid for the reasons set forth herein, and the government's insistence on GDC4S' performance of these invalid Orders constituted a constructive change to the Contract. GDC4S is entitled to an increase in the Contract price (consisting of its costs of performing the Orders, a reasonable license fee for the software delivered with each unit, and a reasonable profit, less any amounts paid by SPAWAR) and to a reasonable schedule for performing the Orders.

(*id*. ¶ 36)

In the "PRAYER" portion of its complaint, appellant requested that the Board:

> [S]ustain this appeal, require the government to bear the burden of pleading and proving the alleged validity of the Orders, determine that the Orders were invalidly issued, determine and order that the DMR Contract price and schedule should be equitably adjusted, with interest in accordance with the [CDA], and grant such other and further relief to which GDC4S may be entitled.

(*Id*. at 9)

In its answer to the complaint, the government asserted, *inter alia*, that: (1) the Board lacks jurisdiction because appellant seeks only non-monetary relief and an equitable adjustment to the delivery schedule that were not part of its claim and has not asked that the Board award it the $78,220,345 equitable adjustment that was the subject of the contracting officer's decision; (2) the parties' course of conduct "constitutes a waiver by appellant of the contract prohibition against the issuance of delivery orders by email" and estops it from asserting such a prohibition; (3) appellant knew that the contracting officer lacked authority to order items after 30 September 2003; and (4) appellant failed to state a claim because it did not assert that the issuance of delivery orders by e-mail rather than by U.S. mail caused it any injury. (Answer ¶¶ 34, 47-51)

DISCUSSION

I. The Motions

A. Appellant's Motion for Partial Summary Judgment

Appellant moves for summary judgment on the ground that DO Nos. 18-20 and 22-29 were not issued in accordance with the contract's requirements and thus were not binding. It alleges, among other things, that: (1) delivery orders are an acceptance of an offer and must adhere strictly to all of its terms, as with the government's exercise of an option; the contract's ordering provisions did not allow issuance of delivery orders by e-mail or through a support contractor; (2) the contractor's prior acceptance of e-mailed counter offers was an exercise of its right to accept them and did not bind it to accept any others; (3) express contract terms control over course of performance; (4) the contractor did not waive and is not estopped from enforcing the Ordering clause's terms; the contracting officer did not rely upon any alleged waiver by appellant in arranging for the delivery orders to be e-mailed but was simply following SPAWAR policy; and appellant could not waive provisions that are not solely for its benefit, but are included for the government's benefit to protect against violations of the Anti-Deficiency Act, 31 U.S.C. § 1341; (5) modifications to the Ordering clause concerning other matters stated that all other contract terms remained unchanged; and (6) when appellant claimed a change concerning HF DO No. 16, based upon alleged past conduct, the contracting officer asserted that express contract provisions, not conduct, control.

In addition to alleged jurisdictional impediments, the Navy opposes appellant's motion on the grounds, among others, that: (1) appellant has not proved a constructive contract change; (2) there are genuine issues of material fact concerning whether the contracting officer demanded performance or merely requested assurances; whether he had actual authority to order work on 8 October 2003, which was after the end of the ordering period; whether the change caused a cost increase, because some orders for services were on a cost reimbursement basis, with ceiling prices, and the Changes clause allegedly does not apply to cost reimbursement CLINs; whether appellant delivered conforming goods or the Navy waived any defects; and whether appellant was a volunteer; (3) the 8 October 2003 letter was a counteroffer available for acceptance and appellant's election to perform the orders accepted them in accordance with their terms; and (4) there might be material fact issues about waiver, but not estoppel.

B. Navy's Cross-Motion for Summary Judgment

The Navy cross-moves for summary judgment. It alleges, among other things, that appellant is not entitled to relief under the Changes clause due to the issuance of delivery orders by e-mail because: (1) appellant failed to protest before the ordering

period ended; (2) the parties' pre-dispute conduct—the continued use of e-mailed delivery orders for five years—indicates that the method of issuance was not a performance condition; (3) appellant elected to perform; and (4) appellant was not harmed and would reap a windfall if allowed a price adjustment. The Navy further alleges that appellant is not entitled to relief due to the government's alleged violation of FAR Part 17 because: (1) appellant waived the issue by failing to protest the alleged illegality; (2) FAR Part 17 violations are beyond the scope of the Changes clause; (3) the Navy did not violate FAR Part 17; and (4) the Navy has the right to exercise an option even if the terms are unfavorable to the contractor. With respect to appellant's claim that SPAWAR violated FAR 17.204(e), the Navy asserts that the DMR is an information technology system and the regulation does not apply to information technology contracts. The Navy adds that it was to use FACNET whenever practicable or cost effective, per FAR 4.502.

The Navy concludes that two undisputed facts entitle it to prevail: (1) Appellant did not protest the use of e-mails in transmitting delivery orders until after the last option period ended; and (2) Appellant registered in the CCR to conduct electronic commerce with the government, facilitating receipt of contract awards and orders by e-mail.

Appellant responds, concerning its lack of protest of e-mailed DO Nos. 2 through 15, that most "followed extensive negotiations between the parties leading to bilateral Contract modifications providing benefits to" the contractor (app. resp. at 7, ¶ 6, at 21-22; *see* ex. C, 9/5/06 Polowski decl., ¶ 6, ex. D, Schumacher decl., ¶¶ 5, 6, 8, 9, 11, 12, 15). Appellant asserts that it protested DO Nos. 16 (on other than e-mail grounds), 17 through 20, and 22 through 29 and that its protests were timely, given the very short time between the e-mailed delivery orders and the end of the ordering period. It adds, arguendo, that, even if the parties had agreed to e-mailed delivery orders, the contracting officer's renewed insistence upon strict adherence to the contract's terms would have vitiated the agreement. Appellant denies any potential windfall, noting that DCAA questioned only $4,098,232 of its $78,220,345 claimed costs. Appellant disputes that FAR 4.502 allowed e-mailed delivery orders under the contract and asserts that its CCR registration, applicable to multiple contracts, did not change the subject contract's prohibition against issuing delivery orders by e-mail but merely allowed the parties otherwise to engage in electronic commerce. Appellant further alleges that FAR 16.505(a)(5) precluded an e-mail delivery method if the contract did not provide for one.

Appellant also disputes each of the Navy's FAR Part 17 contentions. Among other things, it denies that the contract was an "information technology contract" as the phrase is used in FAR 17.204(e), and as "information technology" is defined in FAR 2.101. It states that SPAWAR classified the DMR otherwise and, at a minimum, there is a genuine issue of material fact concerning this point.

We have considered all of the parties' arguments. Those we do not address are either unpersuasive or not necessary to our decision.

II. Jurisdiction

The Navy queries whether appellant's alleged failure expressly to pursue the monetary relief sought in its claim was an oversight or reflects its intent to abandon that relief. At the same time, the Navy acknowledges that the Board could "fairly imply an appropriate demand in the prayer for relief from the factual allegations in the Complaint" and that the "Navy would also agree that the Board's lack of jurisdiction over other matters would not deprive the Board of jurisdiction over the monetary claim presented to the Contracting Officer." (Gov't resp. at 21)

It is obvious from appellant's complaint that it continues to seek the specified monetary relief of $78,220,345, plus CDA interest. Appellant's prayer that the Board order that "the DMR Contract price and schedule should be equitably adjusted" referred to the relief cited in the contract's Fixed-Price Changes clause (app. reply at 13-14 n.6). If there are issues to be decided concerning the schedule, they have not been identified. The Board clearly has jurisdiction to entertain the appeal, and we need not now discuss our ability to award declaratory relief. [4]

III. Summary Judgment Standards

Summary judgment is an appropriate method to resolve an appeal or portions of it when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. A disputed fact is only material if it might make a difference in the appeal's outcome. Although cross-motions for summary judgment covering the same central issue can suggest that the material facts are undisputed, cross-motions do not necessarily mean that summary judgment is appropriate. We evaluate each motion on its own merits and draw all reasonable inferences against the movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562-63 (Fed. Cir. 1987); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987).

There is a genuine issue of material fact if the evidence is such that a reasonable fact finder could find in favor of the non-movant. *Anderson, supra*, 477 U.S. at 248. In deciding a summary judgment motion, we do not resolve factual disputes but ascertain whether there is a genuine issue of material fact. The movant must show the absence of one. The nonmovant must respond with facts demonstrating that there is one. *Basic*

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[4] *See Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1270-71 (Fed. Cir. 1999) (describing board authority to grant declaratory relief).

Marine, Inc., ASBCA No. 53256, 02-1 BCA ¶ 31,677 at 156,542 (summary judgment granted to government when appellant alleged it performed work under indefinite quantity contract without delivery order because government's practice was not to issue written orders; Board found this immaterial; government had issued several delivery orders and contract authorized issuance orally, electronically, and by other means); *see also Southern Defense Systems, Inc.*, ASBCA Nos. 54045, 54528, 07-1 BCA ¶ 33,536 at 166,135 (cross-motions for summary judgment denied in appeals involving, *inter alia*, alleged improper delivery order; disputed facts concerned estoppel, coercion, and parties' conduct).

IV. Delivery Orders/Options; Constructive Change; Duty to Perform; Contract Language; Course of Performance; Waiver; Estoppel

Appellant contends that the government's issuance of a delivery order under an IDIQ contract is an acceptance of the contractor's offer and must be effected strictly in accordance with the offer's terms, as expressed in the contract. It is elemental that, for a contract to be formed once an offer is made, the government must manifest its assent in the manner invited or required by the offer. *Anderson v. United States*, 344 F.3d 1343, 1355-56 (Fed. Cir. 2003); RESTATEMENT (SECOND) OF CONTRACTS § 50(1) (1981). If an offer prescribes the manner of acceptance, its terms must be complied with in this respect in order to create a contract. RESTATEMENT § 60. Appellant likens the government's issuance of a delivery order to its exercise of an option and the Navy appears to agree (*see* gov't mot. at 20: "(*i.e*., like the exercise of an option, the delivery orders in effect being an acceptance of a firm offer creating a new contract)"). It is established that the government's failure to exercise an option in strict compliance with its terms, while requiring the contractor to perform, is a constructive change, absent waiver or estoppel against the contractor. *Lockheed Martin IR Imaging Systems, Inc. v. West*, 108 F.3d 319, 323-24 (Fed. Cir. 1997); *Chemical Technology Inc*., ASBCA No. 21863, 80-2 BCA ¶ 14,728 at 72,641; *see also Holly Corp*., ASBCA No. 24975, 83-1 BCA ¶ 16,327 at 81,168-69.[5]

[5] The constructive change doctrine applies even when a contract's Changes clause, like those here, read literally, would be limited to changes affecting drawings, designs or specifications; shipment or packing methods; or places of delivery (and government-furnished property, in the case of the Time-and-Materials or Labor-Hours Changes clause). *See General Dynamics Corp*., ASBCA No. 20882, 77-1 BCA ¶ 12,504 at 60,623; *see also Lockheed Martin IR Imaging Systems, supra* (same Fixed-Price Changes clause as here (*see* decision below, *Loral Infrared & Imaging Systems, Inc*., ASBCA No. 45744, 95-2 BCA ¶ 27,803 at 138,631)).

Appellant relies upon *Dynamics Corporation of America v. United States*, 389 F.2d 424 (Ct. Cl. 1968). The basic dispute in *Dynamics*, which involved an indefinite quantity contract, was whether orders were "issued" within the contract-specified time period. 389 F.2d at 426. The government contended that they were issued upon the date of mailing, and the contractor, upon the date of receipt. The contract did not address this point. The government asserted that the parties' conduct demonstrated their mutual intent that the orders were effective upon mailing, but the majority of the court concluded that there was no relevant conduct prior to the time the dispute arose. The court described the ordering portion of the contract as an "option contract" (*id*. at 430), and in granting summary judgment to the contractor, it relied upon precedent that notice to exercise an option is effective only upon receipt, unless the parties otherwise agree.

Citing the contractor's obligation under the contract's Disputes clause to continue performance, the court in *Dynamics* also rejected the government's argument that the contractor should have refused to perform the contested orders when the government directed it to do so, and that it had waived recovery of any amounts in excess of the contract price when it deliberately elected to perform. *Accord General Dynamics Corp., supra*. We reject the Navy's same argument in this appeal for the same reason[6].

We also reject the Navy's argument that the contracting officer's 8 October 2003 letter requesting reasonable assurances that the contractor would perform either was not a performance demand or reflects a disputed fact issue (gov't resp. at 13; gov't surreply at 7). A request for assurances is a common prelude to a breach or termination claim. *See National Union Fire Insurance Co.*, ASBCA No. 34744, 90-1 BCA ¶ 22,266 at 111,855-56, *aff'd mem.*, 907 F.2d 157 (Fed. Cir. 1990) (unpub.) (demand for performance assurance appropriate when party has reasonable grounds to suspect breach; failure to give assurance can be treated as contract repudiation). Appellant was justified in interpreting the letter as a demand for performance. Moreover, the demand pertained to delivery orders which the Navy deemed to have been validly issued during the contract period. We are not persuaded by the Navy's alternative contention that the contracting officer's letter constituted an unauthorized unilateral order issued after the contract period had expired (gov't resp. at 13-14; gov't surreply at 7).

Apart from the common issue of duty to perform, this appeal presents different facts and contract provisions than in *Dynamics*, and we need not decide whether the

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[6] The Navy also contends that the Disputes clause's requirement for continued performance is limited to occasions when the contracting officer has issued a decision denying a claim (gov't surreply at 8-9). However, the clause clearly calls for continued performance regardless of the status of any contracting officer's decision. See also the contract's Changes clauses (failure to agree to an adjustment is a dispute and does not excuse the contractor from performing).

contract's ordering provisions are "option contracts." Their classification is not dispositive. We are to interpret the operative contract language, regardless. *International Telephone and Telegraph v. United States*, 453 F.2d 1283, 1293 (Ct. Cl. 1972) (discussing *Dynamics*). In *International Telephone and Telegraph*, the terms of the subject multi-year procurement contract required that the contracting officer give notice to the contractor in writing by a deadline that funds were available for the year in question, in order for the contract to remain in force for that year. Although the government had given oral notice by the due date, and had attempted to transmit a teletyped notice by that date, the contractor did not receive the teletype until the next day. The majority noted that the contract required written notice; the parties, by their prior conduct, had construed it as requiring a written notice on or before the specified due date; and the contract made time "of the essence" with respect to giving notice and also made the manner of notice "of the essence." 455 F.2d at 1290-91. In granting summary judgment to the contractor, the court held that the contracting officer's requirement that the contractor furnish equipment at contract prices during the year in dispute was a constructive contract change for which the contractor was entitled to an equitable adjustment. *Id*. at 1293.

In this case, there is no question that appellant received the e-mails at issue and the accompanying signed delivery orders, albeit in PDF format, before the end of the Option V ordering period, and the parties' course of conduct, until the current dispute arose, suggests that the manner of issuance of the delivery orders was not "of the essence" of the contract. After the first delivery order, which was sent by U.S. mail, SPAWAR issued all others via e-mail, through a support contractor. In following a Navy "paperless" policy, it appears that SPAWAR ignored or overlooked the fact that the contract did not allow issuance of delivery orders by electronic commerce methods (*see* gov't resp., ex. A, Lopez decl., ¶ 8). Appellant's registration in the CCR is immaterial and did not negate this contract restriction. Nonetheless, appellant did not protest the use of e-mail until DO No. 17, after the end of the ordering period.

The parties' contemporaneous construction of an agreement before a dispute arises, or practical construction based upon course of performance, are given weight in interpreting a contract's terms if they are unclear. *Blinderman Construction Co. v. United States*, 695 F.2d 552, 558 (Fed. Cir. 1982); *Maxwell Dynamometer Co. v. United States*, 386 F.2d 855, 870 (Ct. Cl. 1967); *Optic-Electronic Corp.*, ASBCA No. 24962, 84-3 BCA ¶ 17,565 at 87,532. However, here, the contract's Indefinite Quantity clause stated that delivery or performance was to be "made only as authorized by orders issued in accordance with the Ordering clause." The contract's Ordering clause clearly stated that "[o]rders may be issued orally, by facsimile, or by electronic commerce methods only if authorized in the Schedule," and the Schedule did not authorize issuance by any of those methods. Under the circumstances:

> Where there is no lack of clarity in the express terms of an agreement, express contract terms are given greater weight than and control course of performance and no "practical construction" arises. RESTATEMENT (SECOND) OF CONTRACTS § 203(B); U.C.C. § 2-208(2).
>
> Even if a course of performance does not give rise to a practical construction, it may be relevant to show a waiver or modification of any express contract terms inconsistent with such course of performance. U.C.C. § 2-208(3).

Optic-Electronic Corp., *supra*, 84-3 BCA at 87,532.

The Navy alleges waiver and estoppel. "[A] consistent course of . . . waiving otherwise clear contract requirements, knowledge of which may reasonably be imputed to *both* parties, may nullify such requirements." *Moore Service, Inc*., ASBCA No. 27436, 83-1 BCA ¶ 16,401 at 81,547. Waiver is "an intentional relinquishment of a known right. An intent to waive a contractual right must be manifest in a party's failure to object." *United Technologies Corp*., ASBCA No. 46880 *et al*., 95-1 BCA ¶ 27,592 at 137,482 (citations omitted). To establish estoppel against appellant, the Navy must show that appellant knew the facts; that it intended that its conduct be acted upon or acted such that the Navy had a right to believe it was so intended; the Navy was ignorant of the true facts; and the Navy relied upon appellant's conduct to its injury. *Rel-Reeves, Inc. v. United States*, 534 F.2d 274, 296-97 (Ct. Cl. 1976); *United Technologies Corp*., *supra*, 95-1 BCA at 137,481.

As the Navy recognizes, there are material issues of fact to be resolved concerning waiver and whether appellant intentionally relinquished its right to enforce the contract's restriction against issuance of delivery orders by e-mail. Appellant has presented evidence to the contrary. For example, Messrs. Polowski and Schumacher declare that certain delivery orders were the product of negotiations concerning pricing and issuance that resulted in bilateral contract modifications (app. resp., ex. C, ¶ 6, ex. D, ¶¶ 5, 9, 11, 12). Mr. Schumacher declares that he did not discuss any modification or waiver of the Ordering clause's provisions with contracting officer Lopez and is not aware of any other such discussions (*id*., ex. D, ¶ 17). Mr. Polowski declares that, on the subject contract, the Navy followed inconsistent practices concerning mailing, faxing, e-mailing, or hand-delivering contract "actions;" on other Navy contracts he administered for appellant, after e-mailing or faxing modifications and delivery orders, the Navy would mail or hand-deliver a hard copy; and he had not appreciated that the Navy's practice was different under the subject contract. (*Id.*, ex. C, ¶ 4) Similarly, there are material facts to be resolved concerning estoppel, such as appellant's intent in accepting certain e-mailed

orders, and whether the Navy's issuance of orders by e-mail was in any respect in reliance upon appellant's prior acceptance of e-mailed orders.

Accordingly, the parties' cross-motions for summary judgment concerning whether the e-mailed delivery orders were binding or amounted to a constructive contract change when the contracting officer required appellant to perform are denied.

V. Alleged FAR Part 17 Violations

The Navy has moved for summary judgment on appellant's arguments that when SPAWAR exercised Option V, it knew appellant was incurring undue risks and its option exercise thus violated FAR 17.202(c)(1), and that the Option V delivery orders at the end of September 2003 were for supplies required in the sixth year after contract award, in violation of FAR 17.204(e)'s 5-year limit.

FAR 17.202 pertains to the government's decision whether to include options in contracts, not to their exercise. Under FAR 17.202(c)(1), the contracting officer "shall not employ options" if the contractor will incur undue risks, for example, if the price or availability of necessary materials or labor is not reasonably foreseeable. Appellant has not presented any evidence to suggest that there is any material issue of fact concerning undue risk at the time of contract formation or that the government improperly included options in the contract. FAR 17.207, Exercise of options, contains instructions and limitations pertaining to the government's option exercise, but none that apply here.

Further, whether the contract is an "information technology" contract, and therefore not subject to FAR 17.204(e), is a disputed fact, but it is not material. The regulation exists primarily for the government's benefit, not that of private contractors. Any benefit that accrues to a contractor from an agency's compliance with the regulation is peripheral. The regulation does not create a cause of action for contractors. *Freightliner Corp. v. Caldera*, 225 F.3d 1361, 1366 (Fed. Cir. 2000) (involving Defense Acquisition Regulation § 1-1502(e), predecessor to FAR 17.204(e)).

The Navy's motion for summary judgment concerning appellant's arguments that the Navy violated FAR 17.202(c)(1) and 17.204(e) is granted.

DECISION

The parties' cross-motions for summary judgment concerning whether the Navy's e-mailed delivery orders were binding or amounted to a constructive contract change when the contracting officer required appellant to perform are denied. The Navy's motion for summary judgment on appellant's arguments that the Navy violated FAR 17.202(c)(1) and 17.204(e) is granted.

Dated: 25 January 2008

CHERYL L. SCOTT
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 54988, Appeal of General Dynamics C4 Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals